BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT L. BRANT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,003,336
BLUE HILL FEEDERS, INC.	)	
Respondent	)	
	)	
and	)	
	)	
HARTFORD ACCIDENT AND INDEMNITY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from a Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore on November 14, 2002.

ISSUES

Following a preliminary hearing the ALJ denied benefits, finding that the claim was time-barred because claimant failed to file the Application for Hearing within the required time limits.

On Appeal, claimant seeks review of the issue concerning whether claimant filed a timely Application for Hearing as required by K.S.A. 44-534.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board (Board) finds the ALJ's Order should be reversed.

K.S.A. 44-534(b) requires that an Application for Hearing be filed with the office of the director within three years of the date of accident or two years from the last payment of compensation, whichever is later. [1] Claimant acknowledges that his Application for Hearing, which was filed on April 5, 2002, was more than three years after his August 22, 1996 accident, but denies it was more than two years after the last compensation was provided. In addition, claimant argues that the respondent and/or its insurance carrier had an affirmative duty to disabuse claimant of his belief that continued treatment was authorized. [2] The Board agrees.

Although the respondent and its insurance carrier are correct that claimant was last treated and released by orthopedic surgeon Velo Kass, M.D., the authorized physician, on November 6, 1998, and was given a permanent impairment rating on January 6, 1999, it is clear that additional medical treatment was contemplated.

> I would like to take his hardware out and it probably should come out, but it is not bothering him that much yet that I would do it right now. I would probably wait a year and then do it at that time. If he has further problems of instability and difficulty, will try him with a derotation type ACL brace. I suggested we might try him now but he said it wasn't bothering him that much that he was prepared to go through all the bother. All in all though I think he has done very well considering the nature of his injury and he is back to his full normal activities. I would like to check him in another year and see how things are coming along and then we can talk about the plate removal at that time. [3]

In a letter dated January 6, 1999, to Retha Buettgenbach, claims adjuster for respondent's insurance carrier, Dr. Kass stated:

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[1] *See Kincade v. Cargill, Inc.*, 27 Kan. App. 2d 798, 11 P.3d 63, *rev. denied* 270 Kan. ____ (2000).

[2] *Shields v. J.E. Dunn Constr. Co.*, 24 Kan. App. 2d 382, 946 P.2d 94 (1997); *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 516 P.2d 1008 (1973).

[3] P.H. Trans., Cl. Ex. 1 chart note dated 9-5-97.

> You also asked whether or not he must have the hardware removed from the knee.
>
> At his age, generally we tend to remove the hardware as there is a situation called stress shielding which occurs because of the excessive rigidity the metallic implants provide to the joint surfaces. There is some debate in orthopedic circles as to the difficulty produced by this phenomenon, particularly at his age which is 59, but I think the majority opinion, mine included, is that he would benefit from having the hardware removed in a couple of years, particularly as he does have some medial cortical penetration of the transfixation screws. [4]

Furthermore, the correspondence between claimant and the insurance carrier clearly indicates that both parties were aware of Dr. Kass' recommendation for additional surgery, and also that claimant was insistent upon any settlement not foreclosing his right to future medical treatment. [5] Under the facts presented, claimant had a reasonable expectation that Dr. Kass remain his authorized treating physician and that his treatment had not been concluded. The respondent and/or insurance carrier had an affirmative duty to disabuse claimant of this well founded belief and failed to do so. Accordingly, the time for filing the Application for Hearing was tolled.

WHEREFORE, the Preliminary Hearing Order entered by Administrative Law Judge Bruce E. Moore on November 14, 2002, is reversed and remanded to the Administrative Law Judge for further proceedings and/or orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of April 2003.

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation

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[4] P.H. Trans., Cl. Ex. 1 letter of Jan. 6, 1999.

[5] P.H. Trans., Cl. Ex. 1.